In the

United States Circuit Court of Appeals

For the Ninth Circuit

No. 4914

JIM BENN, Plaintiff in Error

vs.

UNITED STATES OF AMERICA, Defendant in Error

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

HONORABLE E. E. CUSHMAN, JUDGE

Brief of Defendant in Error

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Brief of Defendant in Error

I.

Plaintiff in error was convicted of the offense of carrying on the business of a distiller of spirits without having given bond and of the offense of having made and fermented mash fit for the distillation of spirits on premises other than an authorized distillery, in violation of Sections 3281 and 3282 of the

Revised Statutes. The evidence in support of these charges is circumstantial in character, no one having been found in the actual operation of the still or in the act of manufacturing the mash. Plaintiff in error owned a farm in what is known as the Bald Hills country about forty miles distant from his home near Olympia, Washington. He made frequent visits to the farm at about the time of the discovery of the mash and the still (Tr. p. 24 and 25). The officers found within a barn two 50-gallon drums of coal oil and three 100-pound sacks of cane sugar. Just outside the barn were two more 50-gallon drums of oil. In a building described as a shack near the barn they found certain papers addressed to the plaintiff in error together with twelve pounds of yeast. The meadow upon the farm was fenced but the fence was not used to mark the boundary of the place (Tr. p. 16 and 17). Automobile tracks lead from the barn and shack to a point where the fence was down and at the barn an automobile truck, belonging to the plaintiff in error, was standing. The soil in the meadow is wet and muddy. The truck wheels had fresh mud on them. The mud was of the same character as that found in the field where fresh automobile tracks were found (Tr. p. 21). The road across the meadow terminates at this break in the fence. From that point a well worn trail lead to a

still and stillhouse. Here the officers found 1,450 gallons of mash, 125 gallons of whiskey and other materials and paraphernalia. Coal oil was the fuel used for heating the still. A 40-gallon drum partly full of this oil was found alongside the trail (Tr. p. 16). There is also a foot trail fresh and recently used running from the barn to the still cutting off some of the distance covered by the automobile tracks or road (Tr. p. 19). There was no other trail or road over which oil drums or other bulky and heavy loads might be taken except over the road and trail leading from the barn to the break in the fence and thence to the still (Tr. p. 22).

Plaintiff in error complains that he was convicted upon mere suspicion and that the circumstances were capable of two constructions, one favorable to the innocence of the plaintiff in error and that it was, therefore, the duty of the court to take the case from the jury. We submit that the evidence so produced by the Government with the legitimate and reasonable inferences to be drawn therefrom, made a case for the jury and that the verdict is conclusive upon the facts.

II.

Plaintiff in error complains of the admission of evidence to the effect that the officers found on this

farm two places where stills had previously been in operation. The Government stated that the object of this evidence was merely to show an additional circumstance tending to show that the business of distillation had been carried on at this place over a period of time. The court admitted the evidence but cautioned the jury as follows: "Unless you find something in the evidence to connect the evidence of the former still operations there with this defendant, do not be prejudiced against him by this evidence." We submit that the evidence was relevant and was not improperly admitted; that if it was not relevant the error in admitting it was harmless in view of the instruction which accompanied it.

III.

It is assigned as error that the Government was permitted to cross-examine the plaintiff in error concerning his efforts to dislodge one Smythe, a former tenant of the farm. The examination and the colloquy are set out on page 17 of the opening brief. It is difficult to discern in what respect this could be considered as prejudicing the rights of the defendant. As a matter of fact the record shows that the examination was abandoned when the objection was made and overruled and the plaintiff in error

was not required to answer the question which was put to him (Tr. p. 25 and 26).

IV.

The matters suggested under points IV and V of the brief will not be discussed. The points propounded assume a premise which is not supported by the record.

CONCLUSION

It is therefore respectfully submitted that the judgment complained of should be affirmed.

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